Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

CHARLES I. COVEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals relied on a legal proposition that was rejected by this Court in its recent decision in *United States v. Hubbell*, 530 U.S. 27 (2000).

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PETITION FOR A WRIT OF CERTIORARI

Charles I. Covey respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 232 F.3d 641 (8th Cir. 2000).

JURISDICTION

The judgment of the court of appeals was issued on November 16, 2000. The court denied a timely filed petition for rehearing and suggestion for rehearing en banc on January 17, 2001. Pet. App. 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in relevant part: "No person shall be . . . compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

1. Introduction

Mr. Covey's conviction was obtained through the use of documents that he had produced under a promise of use immunity. The court of appeals rejected his claim that such use violated his Fifth Amendment privilege, holding that "it is generally not unconstitutional to use the *contents* of documents prepared and produced by a criminal defendant." Pet. App. 13a (emphasis added). Because this view of the law was recently rejected by this Court in *United States v. Hubbell*, 530 U.S. 27 (2000), the case should be remanded to the court of appeals for reconsideration in light of the *Hubbell* decision.

2. Facts

In 1997, a federal grand jury sitting in the Western District of Missouri issued a subpoena to Charles I. Covey as custodian of records for an entity called MGM Enterprises. C. A. App. 26.[1] The subpoena sought records relating to financial transactions with Darrell and Sharon Hart, Hart Independence Motorcycles, Inc., Mercedes Tanz, Hart General Contractors, and other businesses owned or operated by the Harts. *Id.* Mr. Covey's trial counsel, fearing that

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1 "C.A. App." references are to the appendix filed by Mr. Covey in the court of appeals.

"these records" might incriminate Mr. Covey, wrote the prosecutor to solicit immunity. *Id.*

Mr. Covey appeared before the grand jury on July 28, 1997. By then, the prosecutor had received clearance from the Department of Justice to extend immunity to Mr. Covey. C. A. App. 27. Mr. Covey's counsel and the prosecutor agreed that, in lieu of proceeding with formal statutory immunity, the prosecutor would simply read the terms of an immunity agreement into the record before the grand jury. *Id.*

In the grand jury, the prosecutor advised Mr. Covey that he was "going to ask you if you have [the subpoenaed] records and whether you're willing to produce them at this time." C.A. App. 23. Mr. Covey and the prosecutor left the grand jury to speak with Mr. Covey's attorney. *Id.* When they returned, the following transpired before the grand jury:

> Q. Mr. Covey, I indicated to [Mr. Covey's counsel] that what you said in the Grand Jury . . . would not be used against you in any subsequent prosecution; is that correct?
>
> A. As what you said or what I said? I don't understand what you said.
>
> Q. Did I just indicate to [Mr. Covey's counsel] in your presence that the Government would not use what you said against you in any subsequent prosecution; what we granted you, in effect, was use immunity?
>
> A. Okay.

C.A. App. 24. Mr. Covey then produced the records called for by the subpoena. *Id.*

On December 15, 1998, the grand jury returned a three-count indictment against Mr. Covey.[2] Pet. App. 4a. Count I charged Mr. Covey with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). *Id.* Count II charged him with aiding and abetting money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and (2); and Count III sought forfeiture of $70,000 from Mr. Covey under 18 U.S.C. § 982. *Id.* After Count I was dismissed for failure to apprise Mr. Covey adequately of the offense with which he was charged, the grand jury returned a superseding indictment on August 9, 1999 that added factual allegations to Count I and restated Counts II and III. *Id.*

At trial, the government introduced in evidence documents Mr. Covey had produced in response to the grand jury subpoena. Mr. Covey's trial counsel did not object to their introduction into evidence. After a three-day trial, the jury convicted Mr. Covey on all three counts. Pet. App. 5a.

With newly retained counsel, Mr. Covey filed a post-trial motion contending that several errors required either entry of a judgment of acquittal or an order granting a new trial. C.A. App. 7-19. Among the errors claimed was the government's use at trial of the documents Mr. Covey had produced under immunity. C.A. App. 8. Mr. Covey's counsel argued that Mr. Covey's Fifth Amendment rights were violated by the introduction of these documents. *Id.*[3]

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[2] Jurisdiction in the district court was conferred under 18 U.S.C. § 3231.

[3] For this proposition, Mr. Covey's counsel cited the District of Columbia Court of Appeals' decision in *United States v. Hubbell*, 167 F.3d 552 (D.C. Cir. 1998), *aff'd*, 530 U.S. 27 (2000).

The district court denied Mr. Covey's motion. Mr. Covey was sentenced to 57 months in prison. He is currently incarcerated.

On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. Covey again argued that the use of the subpoenaed documents violated his immunity agreement and his Fifth Amendment rights. In its brief on appeal, the government argued that the immunity granted to Mr. Covey did not foreclose use of the documents. Rather, the government argued, the grant of immunity amounted only to a promise not to introduce at trial evidence that Mr. Covey was the source of the documents. The government neither cited nor discussed this Court's decision in *United States v. Hubbell*, 530 U.S. 27 (2000), rendered the previous month. The government also argued that Mr. Covey had failed to preserve the issue for appeal.

The court of appeals rejected Mr. Covey's argument *on the merits*. It stated:

> Covey argues that his Fifth Amendment rights were violated when the court allowed the government to use documents that he had produced. It has long been established that it is generally not unconstitutional to use the *contents* of documents prepared and produced by a criminal defendant. *See United States v. Doe*, 465 U.S. 605, 611-12 (1984).[4]

Pet. App. 11 (emphasis added).

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4 Pages 611-12 of the *Doe* opinion state the proposition that the *contents* of documents are not privileged under the Fifth Amendment, so long as the documents were created voluntarily. This was the proposition on which the government relied *unsuccessfully* in *Hubbell*.

Mr. Covey petitioned the panel and the court en banc for rehearing. The petition was denied on January 17, 2000. Pet. App. 19a.

REASONS FOR GRANTING THE PETITION

In rejecting Mr. Covey's Fifth Amendment claim, the court of appeals held that "it is generally not unconstitutional to use the contents of documents prepared and produced by a criminal defendant." Pet. App. 13a. This view of the law was rejected by this Court's recent decision in *Hubbell*. This case should accordingly be remanded to the court of appeals so that it may apply *Hubbell* to the facts of this case.

In *Hubbell*, this Court held that documents obtained through a grant of immunity may not be used in a criminal case against the immunized witness, except in the narrow circumstance where the government establishes that it has prior knowledge of the documents' existence and whereabouts. 530 U.S. at 45-46. The Court confirmed that such use is prohibited not because the documents' incriminating *contents* enjoy a Fifth Amendment privilege: having been voluntarily prepared, it cannot be said that their creation was in any way "compelled" within the meaning of the privilege. Rather, the Fifth Amendment applies because the act of producing documents in response to a subpoena generally involves privileged testimony, and that testimony leads the government to obtain the incriminating documents.

Thus, *Hubbell* also makes clear that the effect of a grant of immunity generally is to foreclose any use of the documents themselves. This Court explained:

> It is abundantly clear that the testimonial aspect of respondent's act of producing subpoenaed documents was the first step in a chain of evidence that led to this prosecution.

> The documents did not magically appear in the prosecutor's office like "manna from heaven." They arrived there only after respondent asserted his constitutional privilege, received a grant of immunity, and—under the compulsion of the District Court's order—took the mental and physical steps necessary to provide the prosecutor with an accurate inventory of the many sources of potentially incriminating evidence sought by the subpoena. It was only through respondent's truthful reply to the subpoena that the Government received the *incriminating documents* of which it made "substantial use . . . in the investigation that led to the indictment."

Id. at 42-43 (emphasis added) (citations omitted).

The Eighth Circuit failed to analyze the facts of this case under the framework set forth in *Hubbell*. It cited an earlier decision of this Court, *United States v. Doe*, 465 U.S. 605 (1984), for the proposition that "it is generally not unconstitutional to use the *contents* of documents prepared and produced by a criminal defendant." Pet. App. 13a (emphasis added). This is precisely the argument that was made by the government and rejected by this Court in *Hubbell*: "[W]e cannot accept the Government's submission that respondent's immunity did not preclude its derivative use of the produced documents . . . ." 530 U.S. at 43. Thus, *Hubbell* made clear that when immunity is granted, the government may *not* use the contents of subpoenaed documents without demonstrating prior knowledge of their existence and location. *Id.* at 45-46.

Hubbell was decided shortly before the court of appeals rendered its decision. But the government did not cite or discuss it, and the court of appeals did not address it. This case should accordingly be remanded to the court of appeals for further consideration in light of this Court's recent decision in *Hubbell*.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in light of *United States v. Hubbell*, 530 U.S. 27 (2000).

Respectfully submitted,

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April 17, 2001

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1768

United States of America,	*	
	*	
Plaintiff-Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Missouri
Charles I. Covey,	*	
	*	
Defendant - Appellant.	*	

Submitted: September 15, 2000
Filed: November 16, 2000

Before WOLLMAN, Chief Judge, LOKEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Charles Covey was convicted by a jury of conspiracy to commit money laundering and aiding and abetting money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i),

1956(h), and 1956 (a)(2). The district court[1] entered a preliminary forfeiture order for $70,000 pursuant to 18 U.S.C. § 982 and Fed. R. Civ. P. 32(d)(2); it later denied Covey's motion for reconsideration or clarification. Covey was sentenced to 57 months imprisonment and a $19,118.44 fine. Covey now appeals his conviction, sentence, and the preliminary order of forfeiture. We affirm the judgment and dismiss the forfeiture appeal as premature.

Charles Covey was a certified public accountant (CPA) and sole officer, director and shareholder of MCM Enterprises, Inc. (MCM). His sister, Mary Closser, asked him to speak to Gary and Darrell Hart about making them a loan. The Harts were drug dealers who sold and distributed marijuana and who wanted to use cash proceeds from their drug business to start a motocycle sales and repair shop. They were unable to use more than $10,000 cash to buy inventory for the shop without filing federal forms so they were looking for ways to launder their money. The Harts rewarded Closser for connecting them with Covey by paying for a new driveway in front of her house.

During spring 1993 Covey and the Harts had a series of meetings, and Covey agreed to loan the Harts $50,000 through MCM in exchange for their $70,000 cash payment to him. During one meeting Gary Hart told Covey that the cash was from drug proceeds. On June 9, 1993 the parties executed a loan agreement prepared by Covey. The agreement provided that MCM would loan Hart Independence Motorcycles $50,000 at a 13% annual interest rate and the latter would pay MCM $3,072.38 per month for 18 months. The agreement was signed by Covey as president of MCM. Deena Rauscher, Gary Hart's wife, signed the

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[1] The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

agreement for herself and Sharon Hart, Darrell Hart's wife, who was not present. Darrell Hart signed as a guarantor.

The loan agreement represented that the inventory of the motorcycle business was to be collateral for the loan. The inventory did not yet exist, however, and Covey did not take a security interest in the later-acquired inventory. Instead, the Harts met Covey one night in a restaurant parking lot where they gave him a paper bag containing $70,000 in bills. The money was in one thousand dollar stacks held together with rubber bands. Contrary to the recitation in the loan agreement, the coconspirators agreed that the collateral for the principal of the loan was $50,000 in cash, $10,000 was collateral for interest, and $10,000 was termed a loan origination fee.

After the agreement was signed, Covey sent the Harts a $50,000 check, which the Harts deposited in an account under the name of Hart Independence Motorcycles. Covey had not required any financial, tax, or employment information from the Harts. Neither did he file a federal form reporting his receipt of over $10,000 in cash from the Harts. Between July 2, 1993 and January 1994, the Harts made six payments on the loan, totaling $18,441.31. Covey put these payments into MCM's account and then withdrew corresponding amounts for deposit into his personal account.

The motorcycle business was not a success, and the Harts stopped making payments on the loan after January 1994. On October 3, 1994, Covey sent a letter informing the Harts that the loan was in default and that he would begin taking payments from the cash collateral. Thereafter, Covey began to deposit currency from the $70,000 cash payment into MCM's bank account. He deposited approximately $36,000 from these funds and later transferred the money to his personal account.

In December 1995, Covey sent a check for $19,561.86 by certified mail to Darrell Hart with the notation "Refund Excess Loan Collateral." The Harts suspected that Covey was cooperating with law enforcement, and they did not retrieve the mail from the post office. About that time, Covey filed an Internal Revenue Service Form 8300 to report receipt of more than $10,000 in a cash transaction. Covey reported that MCM Enterprises had received $70,000 cash in return for a loan of $50,000 and checked the "suspicious transaction" box on the form. Unlike the loan agreement, which stated that the motorcycle shop inventory was collateral for the loan, the form reported that $60,000 in cash was received as collateral and that the remaining $10,000 was a loan fee.

On December 15, 1998, a federal grand jury returned a three count indictment against Covey. Count I charged Covey with conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Count II charged Covey with aiding and abetting money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and (2). Count III sought forfeiture of $70,000 from Covey under 18 U.S.C. § 982. On July 28, 1999, the district court dismissed Count I on the grounds that the count did not adequately apprise the defendant of the charge. On August 9, 1999, a grand jury filed a superseding indictment which restated all three counts and added factual allegations to the conspiracy charge in Count I.

At trial, the jury was given an instruction on conspiracy, which read in pertinent part:

> It is not necessary that the government prove, beyond a reasonable doubt, that more than one act was done in furtherance of the conspiracy. It is sufficient if the government proves beyond a reasonable doubt, one such act; but in that event, in order to return a verdict of guilty, you must unanimously agree upon which act was done.

Jury Instruction 19.

The jury returned a guilty verdict on all three counts, including the forfeiture count. The district court then entered a preliminary order requiring Covey to forfeit $70,000. Covey objected that he had not had sufficient notice or opportunity to be heard and that the amount of the forefeiture was excessive. The district court denied his motion for reconsideration or clarification and sentenced him to 57 months and a $19,118.44 fine. The court found that Covey had used special skills and experience in accounting and finance to further the money laundering scheme and added two levels to his adjusted offense level, resulting in a guideline range of 57 - 71 months. Covey moved for a new trial, judgment of acquittal, arrest of judgment, and a stay of further seizures and accounting of seized assets. The motions were denied. Covey paid over the $70,000 and received a document entitled "Satisfaction of Judgment" on June 5, 2000.

Covey raises a variety of issues on appeal, including insufficient evidence, incomplete jury instructions, and violation of his Fifth and Sixth Amendment rights. He also challenges his conspiracy conviction on the grounds that

Count I of the superseding indictment did not allege an overt act in furtherance of the conspiracy, an element he asserts is essential to the charge. He objects to the preliminary order of forfeiture, arguing that he was not given adequate notice or an opportunity to be heard and that the amount was excessive. He contends that the district court erred when it enhanced his sentence for use of special skills in furtherance of the money laundering scheme. The government counters all points. It argues an overt act is not an essential element of a money laundering offense, that the language of the money laundering statute, 18 U.S.C. § 1956(h),[2] is nearly identical to that for drug conspiracies, 21 U.S.C. § 846,[3] which does not require an overt act be proven as an element of the offense, see United States v. Shabani, 513 U.S. 10, 12 (1994); United States v. Severe, 29 F.3d 444, 447 (8th Cir. 1994), cert. denied, 513 U.S. 1096 (1995). Since 18 U.S.C. § 1956(h) was modeled on 21 U.S.C. § 846, it should be given a similar construction. The government argues that this court does not have jurisdiction to hear Covey's appeal of the preliminary forfeiture order because it is not a final order, that Covey had adequate advance notice and a sufficient hearing, and that the amount was not excessive. The government asserts that the special skills enhancement was appropriate, the evidence was sufficient, and there is no merit to Covey's other arguments.

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[2] "Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h) (2000).

[3] "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2000).

I.

A challenge to the sufficiency of an indictment is reviewed de novo. See United States v. O'Hagan, 139 F.3d 641, 651 (8th Cir. 1998). Count I of the superseding indictment charged:

> That between August, 1992, up to January, 1996, said dates being approximate, in the Western District of Missouri, CHARLES I. COVEY and MARY ANN CLOSSER, defendants herein, did knowingly and intentionally combine, conspire, confederate and agree with each other and other persons, both known and unknown to the grand jury, to willfully conduct and attempt to conduct, financial transactions affecting interstate commerce, including the transfer of approximately $50,000 from CHARLES I. COVEY to the bank account of Hart Independence Motorcycles, Inc., and the transfer of approximately $19,561.86 by a check drawn on the checking account of MCM Enterprises, Inc.; knowing that the transactions were assigned in whole or in part, to conceal and disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, that is the distribution of marihuana; and that while conducting and attempting to conduct the financial transactions knew that the property involved in the transactions represented the proceeds of some form of unlawful activity
> . . . .

Superseding indictment at 1-2.

An indictment is not required to take a particular form and should not be read in a "hyper-technical fashion." See id. It should be "deemed sufficient 'unless no reasonable construction can be said to charge the offense.'" United States v. Morris, 18 F.3d 562, 568 (8th Cir. 1994) (citation omitted). Here, a fair reading of Count I was sufficient to notify Covey that the transfers of checks in the amounts of $50,000 and $19,561.86 were acts the government alleged he performed in furtherance of the money laundering conspiracy.

The offense of money laundering is described in this way in the statute:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(B)(i) (2000). Here, the object of the conspiracy was to conceal the nature of the Harts' drug proceeds. Covey committed acts in furtherance of that conspiracy when he gave the Harts checks in return for cash that he knew was derived from illegal activities. See United

States v. Norman, 143 F.3d 375, 377-78 (8th Cir. 1998). Count I charged him with knowingly conducting a financial transaction designed to disguise the source of illegal proceeds by transferring $50,000 and $19,561.86 checks to Hart Independence Motorcycles. It thus alleged overt acts in furtherance of the conspiracy. See United States v. Hutchinson, 488 F.2d 484, 490 (8th Cir. 1973) (an overt act is "an act of one or more of the conspirators to effect the object of the conspiracy" (citation omitted)).

II.

Federal Rule of Criminal Procedure 32(d)(2) provides that "the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order." The preliminary order is not a judgment or a final order. See United States v. Coon, 187 F.3d 888, 901 (8th Cir. 1999), cert. denied, 120 S.Ct. 1417 (2000). Rather, the forfeiture becomes final when "a final order of forfeiture shall be made part of the sentence and included in the judgment." FED R. CRIM. P. 32(d)(2). After the order of forfeiture is included in the judgment, the preliminary order is appealable as part of the judgment. See Coon, 187 F.3d at 901.

In this case no final order of forfeiture was included in the judgment. The judgment indicates that the jury returned a guilty verdict on Count III, but makes no other reference to the forfeiture. The space after the preprinted section with the heading "The defendant shall forfeit the defendant's interest in the following property to the United States:" was left blank. No forfeiture amount is mentioned in the judgment. Covey complied with the court's preliminary post verdict order to forfeit $70,000, and the government conceded at oral argument that he still has a right to question

the amount for which he should finally be held accountable.[4] We do not have jurisdiction when no final forfeiture order or judgment has been entered so the appeal must be dismissed as premature. See id. (citing United States v. Casas, 999 F.2d 1225, 1231-32 (8th Cir. 1993), cert. denied, 510 U.S. 1078 (1994)).

III.

The sentencing guidelines provide for an enhancement of two levels if "the defendant ... used a special skill, in a manner that significantly facilitated the commission or concealment of the offense ...." U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (1998). "'Special skill' refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts." Id. at cmt. 3.

Covey argues that the two level enhancement to his sentence was inappropriate because he did not use any special skills to make the loan to the Harts. A district court's factual determination that the defendant used special skills in the commission or concealment of the offense is reviewed for clear error. See United States v. Graham, 60 F.3d 463, 468 (8th Cir. 1995); United States v. Garfinkel, 29 F.3d 1253,

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[4] The concurrence suggests that Covey would not be liable for the full $70,000 if the Harts forfeit some part of that amount. The cases cited by the concurrence indicate, however, that in criminal forfeiture all coconspirators may be liable for the full amount of the proceeds involved in the criminal enterprise. See, e.g., United States v. McHan, 101 F.3d 1027, 1042 (4th Cir. 1996) (citing with approval cases that indicate that cumulative forfeitures may be permissible). In any event, Covey will have an opportunity to be heard on remand before a final forfeiture judgment is entered against him.

1261 (8th Cir. 1994). The sentencing judge presided at Covey's three day trial and had an opportunity to hear and see the witnesses and make credibility assessments. He determined that Covey had used his special skills as a CPA to effectuate the money laundering scheme, finding that Covey had been a CPA since 1972, that he had skills and experience in accounting and finance, that he had prepared an amortization schedule, a loan agreement and other loan-related financial documentation, and that he had used multiple bank accounts in order to carry out the scheme. Because the district court did not clearly err, we will not disturb its factual findings. See Koon v. United States, 518 U.S. 81, 97 (1996).

Covey claims that members of the general public can prepare loan documents and amortization tables and that he used a loan document program to prepare them. The legal question is not whether the task could be performed by a person without special skills, but whether the defendant's special skills aided him in performing the task. See United States v. Noah, 130 F.3d 490, 500 (1st Cir. 1997) (tax preparer used special skills in fraudulently filing online tax returns); United States v. Lewis, 41 F.3d 1209, 1214 (7th Cir. 1994) (truck driver employed specialized driving skills during a theft); United States v. Fritzson, 979 F.2d 21, 22 (2d Cir. 1992) (accountant used special skills in filing fraudulent tax returns for his children). There is no requirement in the guidelines that the enhancement for use of special skills be used only for complex tasks. See Noah, 130 F.3d at 500. Since Covey's special skills assisted him in conspiring with the Harts and in aiding and abetting money laundering, we affirm the application of the special skills enhancement in this case.

IV.

Covey's other arguments do not require much discussion. He asserts that the district court should have granted his motions for judgment of acquittal or for a new trial on the grounds that there was insufficient evidence to convict him on any of the three counts. A denial of a motion for acquittal based on insufficiency of evidence is reversed only if the evidence, viewed in the light most favorable to the government, is such that a reasonable jury must harbor a reasonable doubt that the defendant was guilty of the crime charged. See United States v. Martinez, 168 F.3d 1043, 1047 (8th Cir. 1999). The denial of a new trial is reviewed for clear and manifest abuse of discretion. See United States v. Lacey, 219 F.3d 779, 783-84 (8th Cir. 2000). Covey's claims of insufficiency are without merit since there was ample evidence to support the verdicts and no showing that a new trial was needed.

Covey claims that the district court erred when it failed to give certain jury instructions at trial, but he did not raise these claims at trial so they are reviewed for plain error. See United States v. Jorgensen, 144 F.3d 550, 560 (8th Cir. 1998). Covey argues that the district court should have given the jury an instruction on willfulness in conjunction with Count I, an instruction defining "attempt" in conjunction with Counts I and II, an instruction that a guilty verdict on each count of the indictment must be supported by unanimity, a good faith instruction, and an instruction than an overt act was an essential element of Count I. The district court did not err in omitting any of these instructions. No willfulness instruction was required because the requisite state of mind for both conspiracy and money laundering is knowledge. See, e.g., United States v. Madrid, No. 99-4060NI, 2000 WL 1294323, at *3 (8th Cir. Sept. 14, 2000); United States v. Jensen, 69 F.3d 906, 911 (8th Cir. 1995).

Covey was not charged with attempt to commit money laundering so it was not necessary to instruct on attempt. A general unanimity instruction is usually sufficient to protect a defendant's right to a unanimous verdict, see United States v. Davis, 154 F.3d 772, 783 (8th Cir. 1998), and we find no plain error in the lack of a specific unanimity instruction in this case. As the appellant concedes, good faith instructions generally are not given in money laundering cases. Finally, a sufficient instruction on an overt act requirement was given.

Covey argues that his Fifth Amendment rights were violated when the district court allowed the government to use documents that he had produced. It has long been established that it is generally not unconstitutional to use the contents of documents prepared and produced by a criminal defendant. See United States v. Doe, 465 U.S. 605, 611-12 (1984).

Covey also claims that the district court erred in denying his motion for an evidentiary hearing to determine whether he was deprived of his Sixth Amendment right to effective counsel. A claim of ineffective assistance usually requires the examination of facts outside the original record so it is more appropriately raised in a collateral proceeding under 28 U.S.C. § 2255. See, e.g., United States v. Martin, 59 F.3d 767, 771 (8th Cir. 1995); Kelly v. Crunk, 713 F.2d 426, 427 (8th Cir. 1983) (per curiam).

V.

Covey has not shown that he is entitled to a judgment of acquittal, a new trial, or resentencing. We affirm the judgment of the district court and dismiss the appeal of the preliminary forfeiture order as premature.

LOKEN, Circuit Judge, concurring in part and dissenting in part.

I respectfully dissent from Part III of the court's opinion, which affirms the imposition of an upward special skills sentencing adjustment. I concur in the court's disposition of the forfeiture issue but for reasons not addressed in Part II. In all other respects, I join the court's opinion.

I.

In Part III, the court affirms the district court's finding that Covey used his special skills as a CPA to effectuate the money laundering offense. The court frames the issue as being "whether the defendant's special skills aided him in performing the task." Ante at p. 9. That understates the government's burden in proving this role-in-the-offense adjustment. The Guidelines provide for a two-level upward adjustment if the defendant "used a special skill, in a manner that *significantly facilitated* the commission or concealment of the offense." U.S.S.G. § 3B1.3 (emphasis added); see United States v. Graham, 60 F.3d 463, 468 (8th Cir. 1995). Applying this more stringent standard, I conclude the district court's finding was clearly erroneous.

The Sentencing Commission included accountants in its examples of persons who possess the requisite special skills. See U.S.S.G. § 3B1.3, comment. (n.3). But the question is whether Covey used those skills to significantly facilitate the money laundering loan transaction. The drug dealers, Gary and Darrell Hart, did not seek out Covey for his accouting skills. They dealt with him as a lender, and Covey made the loan through his personal investment company, MCM. The district court reasoned that Covey used his special training and experience in creating a loan amortization schedule and in documenting the loan transaction. In fact, Covey used a computer program to

generate the amortization schedule and loan documentation. Such resources are readily available to any lender such as MCM, and are doubtless available to any layman wishing to make an isolated loan to a friend or acquaintance. Thus, the record does not support a finding that Covey used his special skills as a CPA to significantly facilitate the *commission* of the offense. Compare United States v. Hemmingson, 157 F.3d 347, 359-60 (5th Cir. 1998); United States v. Foster, 876 F.2d 377, 378 (5th Cir. 1989).

The record also contains no evidence that Covey used his CPA skills to significantly facilitate the *concealment* of the money laundering offense. Indeed, the evidence was to the contrary. Covey attempted to conceal his receipt of cash collateral by having the loan documents grant MCM a security interest in the Harts' motorcycle shop inventory. But the loan was made before the inventory was acquired, and the loan documents failed to include a routine provision extending the lender's security interest to after-acquired inventory. In addition, when Covey sought legal advice in December 1995 (long after the June 1993 loan), counsel advised him to file an IRS Form 8300, a cash transaction report that must be filed by persons who receive more than $10,000 cash in a transaction entered into in the course of their trade or business. I have little doubt that a sophisticated money launderer would have known the cash transaction reporting requirements and would have attempted to structure the loan to the Harts so as to avoid those requirements. Absent proof by the government to the contrary, these facts suggest either that Covey was an incompetent CPA, or that after-acquired security interests and cash transaction reports are not part of a CPA's special knowledge and skill, or that Covey had the knowledge and skill but did not apply them to this transaction. No matter which inference is accurate, the upward special skills adjustment is unwarranted.

By ignoring uncontroverted evidence that Covey either did not have or did not use special CPA skills to significantly facilitate this offense, the district court and this court have impermissibly broadened § 3B1.3 to increase Covey's sentence based on his mere status as a CPA. I respectfully dissent in part.

II.

Although I agree with the result reached by the court in Part II of its opinion, I find the forfeiture issue more difficult than the court acknowledges. One principle has been established -- in this circuit, a preliminary forfeiture order is not appealable as a final order or judgment. See United States v. Coon, 187 F.3d 888, 901 (8th Cir. 1999), cert. denied, 120 S. Ct. 1417 (2000); contra United States v. Christmas, 126 F.3d 765, 768 (6th Cir. 1997). But here, after entering a preliminary order forfeiting "$70,000 in United States currency," the district court entered a final Judgment reciting that Covey had been found guilty of "Criminal Forfeitures." When a forefeiture is included in the final judgment, "prior case law would suggest that the preliminary order of forfeiture is an appealable part of the judgment." Coon, 187 F.3d at 901; accord United States v. Pelullo, 178 F.3d 196, 202 (3d Cir. 1999), and cases cited.

As the court notes, Covey's final Judgment does not specify what property was forfeited. But the preliminary order forfeited Covey's interest in $70,000 of currency, which of course is fungible property. The preliminary order and the final Judgment together surely give the government as judgment creditor the right to proceed against the forfeited property. And that is precisely how the parties interpreted the situation. After entry of the final Judgment, Covey appealed and moved this court for an order staying the criminal forfeiture. The government opposed that motion,

arguing that it should be permitted as a judgment creditor to immediately seize the forfeited property. We denied the motion for stay, Covey paid the forfeited amount, and the government filed a satisfaction of judgment. In these circumstances, Coon and Pelullo apply and make the forfeiture order final and appealable.

But there is another wrinkle to the problem, one that has not yet been addressed in the evolving law of criminal forfeitures. On appeal, Covey does not challenge the sufficiency of the government's forfeiture evidence. Nor does he raise any issue about his interest in the forfeited property, since the subject of this forfeiture is currency. Rather, he argues, first, that he and the Harts are jointly and severally liable for the $70,000 forfeiture and the government has improperly collected from both; and second, that forfeiting the entire $70,000 from him results in an unconstitutional excessive fine under Austin v. United States, 509 U.S. 602, 621-22 (1993), and its progeny. These are issues going to the manner in which the government *collects* its forfeiture judgment. They are not ripe for final disposition -- by this court or by the district court -- until the government has collected its forfeiture judgments against Covey *and the Harts*. In my view, the forfeiture issues Covey raises are not appealable for this reason, without regard to whether the district court's forfeiture order is now final.

This distinction may be important in the further proceedings the parties contemplate. Both parties agree that Covey and the Harts as conspirators are jointly and severally liable for forfeitures under 21 U.S.C. § 853(a)(l) -- an issue this court has not yet addressed.[5] Covey argues that the

---

[5] See United States v. Pitt, 193 F.3d 751, 765 (3d Cir. 1999); United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996), cert. denied, 520

government has collected more than it deserves -- $70,000 from Covey and additional forfeitures from the Harts. The government responds that property seized from the Harts "represented proceeds of their drug activities" and therefore is not "applicable" to Covey's forfeiture. This dispute raises an unresolved issue of law: when drug proceeds are exchanged by a money launderer for "clean" cash, and the drug dealers use that cash to invest in a legitimate business, may the government recover twice the amount of the drug proceeds by forfeiting both the money launderer's cash and the drug dealer's property? I think not. But the issue should not be resolved until the government has completed its forfeiture collections. Similarly, Covey's excessive fine argument should not be addressed until the district court has held an evidentiary hearing to determine what portion of the $70,000 in drug proceeds the government has collected from Covey, as opposed to the drug dealers, Gary and Darrell Hart.

The government has conceded on appeal that Covey is entitled to a hearing on these issues after it completes its forfeiture collections, and that Covey will be entitled to a refund if he has overpaid his forfeiture liability. Therefore, I concur in the court's decision that the forfeiture issues Covey seeks to raise on appeal are premature.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

U.S. 1281 (1997); United States v. Benevento, 836 F.2d 129, 130 (2d Cir. 1988); cf. United States v. Simmons, 154 F.3d 765, 769 (8th Cir. 1998) (conspirators are jointly and severally liable for the proceeds of a RICO offense).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-1768WMKC

United States of America,		
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
Charles I. Covey,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

January 17, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 3 2001
OFFICE OF THE CLERK

(2)

No. 00-1598

In the Supreme Court of the United States

CHARLES I. COVEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 PM

QUESTION PRESENTED

Whether the government violated petitioner's rights under the Fifth Amendment by introducing at trial documents that petitioner produced in response to a grand jury subpoena.

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In the Supreme Court of the United States

No. 00-1598

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 232 F.3d 641.

JURISDICTION

The judgment of the court of appeals was filed on November 16, 2000. A petition for rehearing was denied on January 17, 2001 (Pet. App. 19a). The petition for a writ of certiorari was filed April 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial, petitioner was convicted in the Western District of Missouri of conspiracy to commit

money laundering, in violation of 18 U.S.C. 1956(h); aiding and abetting money laundering, in violation of 18 U.S.C. 2, 1956(a)(1)(B)(i); and criminal forfeiture under 18 U.S.C. 982 (1994 & Supp. V 1999). Pet. App. 1a-2a; Pet. C.A. Br. Add. 1. Petitioner was sentenced to 57 months of imprisonment, to be followed by three years of supervised release, and a $19,118.44 fine. *Id.* at 2-5. The court of appeals affirmed petitioner's convictions and sentence. Pet. App. 2a, 13a.

Petitioner was an officer and shareholder of MCM Enterprises, Inc. (MCM). Pet. App. 2a. In 1993, petitioner, on behalf of MCM, loaned $50,000 to Gary and Darrell Hart to start a motorcycle business. *Ibid.* For collateral, petitioner took $70,000 in cash, which the Harts told him was drug proceeds. *Id.* at 2a-3a. When the Harts failed to make loan payments after the first seven months, petitioner deducted the remaining payments from the cash collateral. *Id.* at 3a-4a.

In 1997, a grand jury subpoenaed MCM's records of the loan and related dealings from petitioner as custodian of the corporation's records. See Subpoena to Testify Before Grand Jury 1; C.A. App. 22-23 (7/28/97 Grand Jury Tr. 3-4). When petitioner appeared before the grand jury, the government advised him that "[y]ou need not make a statement or testify or answer any question you feel may tend to incriminate you" and that he could consult with his attorney, who was waiting outside, before answering any question. *Id.* at 21-22. Petitioner, the government, and petitioner's attorney (Bruce Simon) then met outside the presence of the grand jury, after which the government questioned petitioner:

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Q. Mr. Covey, I indicated to Mr. Simon that what you said in the Grand Jury for the United States Attorney for the Western District of Missouri would not be used against you in any subsequent prosecution; is that correct?

A. As what you said or what I said? I don't understand what you said.

Q. Did I just indicate to Mr. Simon in your presence that the Government would not use what you said against you in any subsequent prosecution; what we granted you, in effect, was use immunity?

A. Okay.

Q. Is that correct?

A. To the best of my understanding.

Q. It's my understanding from speaking with your counsel that as custodian of records you are willing to produce today those records requested in the subpoena; is that correct?

A. Yes. Sure.

Id. at 24. Petitioner then turned over the documents. Petitioner did not at any time assert any Fifth Amendment privilege before the grand jury. *Id.* at 20-25.

2. During trial, petitioner stipulated to the authenticity of the records and to their status as business records, see 8/23/99 Stipulation of Facts Regarding Custodian of Records (Exh. P38), after which the government introduced the records, but did not introduce petitioner's grand jury testimony. Trial Tr.

244-247 (Test. of Lucila Rangel). The government also introduced MCM's certificate of corporate records and annual registration reports, which established that MCM was a corporation in good standing both at the time that the documents were prepared and at the time that the documents were subpoenaed and produced. See Exh. P1; Trial Tr. 245. Petitioner did not object to the introduction of the documents. See *id.* at 244-247.[1]

3. After his conviction, petitioner, represented by new counsel, moved for a judgment of acquittal or a new trial, arguing that the introduction of the documents violated his Fifth Amendment rights. Pet. 4. After the motion was denied, petitioner raised the same Fifth Amendment argument, among others, on appeal. Pet. C.A. Br. 46-47. Petitioner relied on *United States* v. *Hubbell*, 167 F.3d 552 (D.C. Cir. 1999), aff'd, 530 U.S. 27 (2000), which was affirmed by this Court shortly after petitioner filed his opening brief. See Pet. C.A. Br. 46-47; Pet. C.A. Rep. Br. 19-20. The court of appeals, relying on *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984), for the proposition that documents prepared and produced by a criminal defendant may be introduced against him, rejected petitioner's Fifth Amendment argument. Pet. App. 13a.

ARGUMENT

Petitioner argues (Pet. 6-8) that this Court should vacate the decision of the court of appeals and remand the case for further consideration in light of *United States* v. *Hubbell*, 530 U.S. 27 (2000). There is, however, no reason to remand this case in light of *Hubbell*. Petitioner's Fifth Amendment claim cannot succeed

[1] In conjunction with filing this brief, we are lodging with the Court copies of the Subpoena, the Stipulation, and Exhibit P1. We have served petitioner with a copy of the lodging.

because, as the custodian of corporate records, he had no privilege against the compelled production of those records. See *Braswell* v. *United States*, 487 U.S. 99, 117 (1988) ("a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating"). And petitioner's immunity agreement provided him no more than he was entitled to under *Braswell*—that the government would make no evidentiary use of his "individual act" of production against him. *Id.* at 118. Petitioner, who did not object to the admission of the documents at trial, cannot show error, much less plain error. The Court should therefore deny the petition for a writ of certiorari.

1. The court of appeals rejected petitioner's Fifth Amendment claim on the ground that "it is generally not unconstitutional to use the contents of documents prepared and produced by a criminal defendant." Pet. App. 13a (citing *United States* v. *Doe*, 465 U.S. 605, 611-612 (1984)). To the extent that the court relied on *Doe* for the proposition that the Fifth Amendment does not prohibit the use of personal documents the production of which has been compelled, that proposition is not consistent with this Court's decision in *Hubbell*. See 530 U.S. at 40-43.

In *Hubbell*, the defendant invoked his Fifth Amendment privilege before a grand jury and refused to produce personal documents that the government had subpoenaed. See 530 U.S. at 31. In response, the government obtained, pursuant to 18 U.S.C. 6002-6003, an order that compelled the production of the documents and granted him immunity "to the extent allowed by" those provisions. See 530 U.S. at 31 (citation omitted). This Court held that the act of producing the personal documents could be compelled only if the

defendant was granted immunity pursuant to 18 U.S.C. 6002-6003. See 530 U.S. at 38, 45. The Court also held that those statutory provisions provide immunity coextensive with the Fifth Amendment privilege against self-incrimination, *id.* at 45, and therefore prohibit not only the "use" of the act of production but also the "derivative use of the produced documents." See *id.* at 38, 43.

Although *Hubbell* establishes that the government cannot use the contents of documents produced under compulsion and a statutory grant of immunity, the judgment of the court of appeals rejecting petitioner's Fifth Amendment claim is correct, because petitioner neither had nor asserted before the grand jury any Fifth Amendment right to resist production of the documents at issue here. Those documents are corporate documents of MCM. See 8/23/99 Stipulation of Facts Regarding Custodian of Records 2; Trial Tr. 246. As the government established at trial, MCM was a corporation organized under the laws of Missouri and in good standing both at the time that the documents were created and at the time that they were subpoenaed and produced. See Exh. P1; Trial Tr. 245. The documents were subpoenaed from petitioner in his capacity as custodian of corporate records. See Subpoena to Testify Before Grand Jury 1; C.A. App. 23, 24. Petitioner, as custodian of the records of a collective entity, therefore lacked any Fifth Amendment privilege to resist production of those documents. See *Braswell*, 487 U.S. at 117, 119.

Although, under *Braswell*, the government could not have introduced into evidence that the subpoena was served on petitioner as custodian of records and that he produced the documents, 487 U.S. at 118, the government did not do so. Instead, petitioner stipulated to the

authenticity of the records and to their status as business records, see 8/23/99 Stipulation of Facts Regarding Custodian of Records, after which the government introduced the records, but did not introduce petitioner's grand jury testimony. Trial Tr. 244-247. The introduction of the documents therefore did not violate petitioner's rights under *Braswell*.

2. Nor did the introduction of the documents violate the government's promise to petitioner of "use immunity"—that "what [petitioner] said in the Grand Jury * * * would not be used against [him] in any subsequent prosecution." C.A. App. 24. Because petitioner, unlike Hubbell, did not have and did not assert a Fifth Amendment right to refuse to produce the documents at issue, petitioner, unlike Hubbell, was not granted immunity pursuant to 18 U.S.C. 6002-6003. Unlike the grant of statutory immunity in *Hubbell*, 530 U.S. at 45, the non-statutory immunity that the government promised petitioner in this case was not co-extensive with the Fifth Amendment privilege that petitioner would have possessed in his individual capacity, and it did not encompass protection against derivative use. Rather, the government promised petitioner only the protection to which he was entitled under *Braswell*—that the government would not introduce into evidence that the subpoena was served on him as custodian of records and that he produced the documents, see 487 U.S. at 118; or, as the prosecutor phrased it, that the government would not use "what [petitioner] said in the Grand Jury" against him. C.A. App. 24. See *id.* at 21, 23, 24-25 (petitioner's grand jury testimony that he was present pursuant to a subpoena that was served upon him in his capacity of custodian of

records of MCM and that he produced the documents in response to that subpoena).[2]

3. Finally, because petitioner did not object to the introduction of the corporate documents at trial, his claim may be reviewed only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997); Pet. C.A. Br. 46 (acknowledging that the plain error standard applies). The plain error standard requires obvious error that affects substantial rights; even then, a court should not exercise its discretion to reverse unless necessary to protect the fairness, integrity, and public reputation of judicial proceedings. *Johnson*, 520 U.S. at 467. The introduction of the documents in this case could not have violated the Fifth Amendment under *Braswell*, and petitioner cites no authority indicating that admission of the documents was "obvious" error; indeed, for the reasons discussed above, it was not error at all. Under those circumstances, petitioner cannot meet his burden to show plain error.

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[2] Although some courts of appeals have construed a non-statutory government promise of "use immunity" to include a promise of derivative use immunity, see *United States* v. *Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994); *United States* v. *Plummer*, 941 F.2d 799, 804-805 (9th Cir. 1991), they have done so in cases in which the witness possessed a valid Fifth Amendment privilege. Those cases, unlike this one, did not involve a promise of "use immunity" to a custodian of corporate records, who is entitled only to the limited evidentiary protection available under *Braswell*. Whether or not a non-statutory promise of "use immunity" should be interpreted to encompass the full scope of protection provided by the Fifth Amendment when a witness is entitled to that protection, the phrase should not be construed in that manner when, as in this case, the witness is not entitled to that protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2001

(3)

No. 00-1598

In the Supreme Court of the United States

CHARLES I. COVEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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941 F.2d 799 (9th Cir. 1991).....2

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REPLY BRIEF FOR PETITIONER

The government concedes that the ground on which the court of appeals rejected petitioner's Fifth Amendment claim is in direct conflict with this Court's recent decision in *United States v. Hubbell*, 530 U.S. 27 (2000). The court below held that the Fifth Amendment does not prohibit the use of documents produced under immunity in response to a grand jury subpoena; as the government concedes, "that proposition is not consistent with this Court's decision in *Hubbell*." Resp. Br. 5.

The government nonetheless argues that remand for reconsideration in light of *Hubbell* is not required, asserting that the result would be the same had the rule in *Hubbell* been applied. In support of this contention, the government relies upon a number of factual and legal propositions that

were not addressed by the court below. Those propositions are subject to considerable doubt. They should be resolved by the court below on remand.

1. The government contends that the "use immunity" that petitioner was promised in the grand jury "*did not encompass protection against derivative use*" of the documents he produced. Resp. Br. 7 (emphasis added). The government cites neither to record evidence nor legal authority for this proposition, and cites two cases from the court of appeals holding precisely the opposite. Resp. Br. 8 n.2 (citing *United States v. Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994), and *United States v. Plummer*, 941 F.2d 799, 804-05 (9th Cir. 1991)). In *Kilroy*, for example, the court observed that subsequent to this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), "the term 'use immunity' has commonly been used to encompass the broader concept" of derivative use. *Kilroy*, 27 F.3d at 685. The court thus held that "nothing else appearing, an informal use immunity afforded by agreement . . . includes derivative use immunity equivalent to that afforded by the [immunity] statute." *Id.* In this case, the prosecutor told Mr. Covey that "what we granted you, in effect, was use immunity." C.A.App. 24. If there is any doubt that this promise encompasses derivative use immunity, it is a factual question that is more properly left to the court below.

2. The government also contends that petitioner had no Fifth Amendment privilege to withhold the subpoenaed documents in the first place. This position is, of course, completely at odds with the government's decision to promise petitioner use immunity. The government nonetheless asserts that the documents sought and produced under immunity were corporate documents, not personal ones, and that the privilege accordingly does not apply. Resp. Br. 5. The basis for the government's position is that the subpoena was directed to Charles Covey, custodian of

records for MCM Enterprises, his one-man corporation. But the subpoena was not limited to corporate records. Instead, it called for the production of "personal" records, as well as "business" records. Subpoena to Testify Before Grand Jury 2.[1]

The rider describing the documents required to be produced is entitled "Attachment to Subpoena, Charles Covey/MCM Enterprises." *Id.* The documents described are nowhere limited to MCM corporate records. Instead, the subpoena calls for production of "*personal* and/or business records" maintained on behalf of certain parties, and "*personal*, business, and/or cashier's checks." *Id.* (emphasis added). Thus, the government's assertion that only corporate documents are at issue is subject to considerable doubt. This, too, is a factual question that should be addressed in the first instance by the court below under the appropriate legal standards.

3. The government also claims that petitioner's immunity agreement "provided him no more than he was entitled to under *Braswell* [*v. United States*, 487 U.S. 99 (1988)]—that the government would make no evidentiary use of his 'individual act' of production against him." Resp. Br. 5. The government concedes that "under *Braswell*, the government could not have introduced into evidence that the subpoena was served on petitioner as custodian of records and that he produced the documents . . . ." Resp. Br. 6 (citing *Braswell*, 487 U.S. at 118). This point assumes that only corporate documents were produced; as we have already seen, this assumption is subject to doubt. Moreover, the goverment *did* introduce evidence that petitioner produced

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[1] The subpoena is among the materials lodged in connection with the government's brief.

the documents. At trial, the following testimony was elicited by the government on redirect examination of the case agent:

> Q. You went through the MCM records as Mr. Simon [petitioner's trial counsel] indicated to you. *You got them from Mr. Covey pursuant to subpoena.*
>
> A. *Yes.*

8/24/99 Tr. 319 (emphasis added).[2] Thus, even under the limited scope of immunity that the government contends was conferred, it would appear that petitioner's Fifth Amendment rights were violated.

4. Finally, the government argues that because petitioner failed to raise a Fifth Amendment objection in the trial court, the admission of documents he produced under immunity is reviewable only for plain error. The court of appeals did not, however, invoke the plain error rule as a barrier to reviewing petitioner's claim. Moreover, review of an argument raised for the first time on appeal is appropriate where "a previously ignored legal theory takes on new importance due to an intervening development in the law . . . ." *Salvation Army v. Department of Cmty. Affairs*, 919 F.2d 183, 196 (3d Cir. 1990). *Accord Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) ("the mere failure to interpose such a [constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground");

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[2] On cross-examination, petitioner's counsel had asked the agent whether a particular exhibit "was among the records given to you by Mr. Covey." 8/24/99 Tr. 282. Whether this question "opened the door" to the government's introduction of testimony that *all* of the records had been produced by petitioner is, of course, a factual question that will have to be addressed by the court below.

Holzsager v. Valley Hosp., 646 F.2d 792, 798 (2d Cir. 1989) (objections or defenses not waived where they were not known to be available at the time). *Hubbell* clearly and concededly constitutes a new development in the law as it relates to immunity in the context of an individual's production of documents. It was decided during the course of briefing in the court of appeals, and it was promptly brought to the attention of the court.

CONCLUSION

The court of appeals resolved petitioner's Fifth Amendment by relying on a legal proposition that was squarely refuted by this Court's recent decision in *Hubbell*. The case should therefore be remanded to the court of appeals for reconsideration in light of *Hubbell* and to address the alternate grounds for affirmance urged by the government in its opposition to certiorari.

Respectfully submitted,

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AUGUST 2001